APPENDIX A - OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED AUGUST 19, 1999

[PUBLISH]
IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-4787
D.C. Docket No. 97-3 611 -Civ-JAL

CHERYL COHEN, on behalf of herself and others similarly situated,

Plaintiff-Appellant,

versus

OFFICE DEPOT, INC., a Florida corporation,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(August 17, 1999)

Before BIRCH and CARNES, Circuit Judges, and MILLS*, Senior District Judge.

CARNES, Circuit Judge:

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*Honorable Richard Mills, Senior U.S. District Judge for the Central District of Illinois, sitting by designation.

Cheryl Cohen appeals the district court's dismissal of her Florida state law deceptive advertising suit against Office Depot. The district court struck Cohen's prayer for punitive damages from her complaint for failure to comply with a Florida statute requiring a plaintiff to obtain leave of court before requesting punitive damages. Finding that the other relief Cohen requested did not satisfy the amount-in-controversy requirement for diversity jurisdiction, the court dismissed her suit on jurisdictional grounds. For the reasons set forth below, we reverse.

I. BACKGROUND

A. FACTS

Cohen's complaint alleges that Office Depot made representations and statements in its catalogues which led "customers to believe that Office Depot's prices for merchandise in its catalog will be as low, if not lower, than the prices of identical merchandise purchased from any other office supply store, including Office Depot's own stores[,]" when "[i]n fact, Office Depot's catalog prices are often significantly higher than the price of the same item in the Office Depot stores." The complaint also alleges that Cohen relied upon such advertisements in the Fall 1997 catalogue when she purchased by phone a color cartridge for $26.99 and file folder labels for $1.99. When those items were subsequently delivered, the accompanying invoice reflected no delivery charges in the price of the items. A few days later, Cohen went into an Office Depot store and saw the same cartridge priced at $2.00 less, and the same labels priced at $0.30 less, than their prices in the catalogue. An Office Depot spokesman allegedly admitted to

a newspaper that the claim of free delivery was false when the spokesman explained the difference between the store and catalogue prices by saying, "It is certainly not uncommon that catalog pricing would be a little higher because of providing free delivery."

B. PROCEDURAL HISTORY

On November 12, 1997, Cohen filed a complaint in federal district court on behalf of herself and a proposed nationwide class of approximately 39,000 Office Depot customers, alleging that Office Depot had made deceptive statements regarding the pricing of its merchandise in violation of the Florida laws governing unfair and deceptive trade practices, fraud, and misleading and negligent advertising. In addition to compensatory damages, the complaint sought $10,000,000.00 in punitive damages, an injunction prohibiting deceptive advertising in the future, attorney fees, and costs. Because no violation of federal law was alleged, subject matter jurisdiction was founded solely upon diversity of citizenship under 28 U.S.C. § 1332.

Office Depot moved to strike the punitive damages request from the complaint and dismiss the lawsuit. The court granted the motion to strike the punitive damages request on, the ground that Cohen had failed to comply with Florida Statutes § 768.72, which requires a plaintiff to obtain leave from the court before including a prayer for punitive damages in a pleading. The court then determined that the other relief requested by Cohen failed to meet the $75,000 amount-in-controversy requirement for diversity jurisdiction.

Accordingly, the court granted Office Depot's motion to dismiss Cohen's suit for lack of subject matter jurisdiction.[1]

II. DISCUSSION

The issue on appeal is whether the district court erred in concluding that Cohen had not met the $75,000 amount-in-controversy requirement for diversity jurisdiction. For diversity cases originally brought in federal court, the amount in controversy is simply the sum claimed in the plaintiff's complaint, "if the claim is apparently made in good faith. It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal." St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 288-89, 58 S. Ct. 586, 590 (1938).

Cohen argues that her requests for punitive damages, attorney fees, and injunctive relief, taken individually or together, satisfy the amount-in-controversy requirement and establish diversity jurisdiction. Because we conclude that her request for punitive damages alone is sufficient for jurisdictional purposes, we need not consider whether the other relief she requests would suffice.

The Supreme Court has held that "[w]here both actual and punitive damages are recoverable under a complaint[,] each must be considered to the extent claimed in determining jurisdictional amount." Bell v. Preferred Life Assur. Soc. of Montgomery, Alabama, 320 U.S. 238, 240, 64 S. Ct. 5, 6

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[1] The court subsequently clarified that the dismissal was without prejudice.

(1943). Here, Cohen requests $10,000,000 in punitive damages, which is obviously greater than the amount-in-controversy threshold of $75,000. It is undisputed that under state law Cohen would be entitled to an unspecified amount of punitive damages on two of her claims if she is successful.

Under our holding in Tapscott v. MS Dealer Service Corporation, 77 F.3d 1353, 1358-59 (11th Cir. 1996), in a class action lawsuit punitive damages may be aggregated to satisfy the amount-in-controversy requirement for each class member. To be sure, Tapscott involved Alabama law, not Florida law, and it did not establish a broad rule that all punitive damages claims may be aggregated for purposes of determining the amount in controversy. Tapscott did hold, however, that punitive damages may be aggregated where state law provides that an award of punitive damages is for the "public benefit" or "collective good," and the award would reflect "the wrongfulness of the defendant's course of conduct as a whole."Tapscott, 77 F.3d at 1358.

Those conditions are met in this case. Because Florida law, like Alabama law, provides that "punitive damages are warranted only where the egregious wrongdoing of the defendant ... constitutes a public wrong," Chrysler Corp. v. Wolmer, 499 So. 2d 823, 825 (Fla. 1986), awarding punitive damages is for the public benefit or collective good. Likewise, as in Tapscott, 77 F.3d at 1358-59, the award of punitive damages will reflect not the wrong done to any single individual but the wrongfulness of the conduct as a whole.

Accordingly, under Tapscott, punitive damages, in this Florida diversity case may be aggregated to satisfy the amount-

in-controversy requirement for each class member. But that can occur only if Cohen is permitted to assert her request for punitive damages. The district court struck Cohen's prayer for punitive damages, because she failed to comply with the conditions for seeking punitive damages set forth in Florida Statutes § 768.72. Section 768.72 provides as follows:

> In any civil action, no claim for punitive damages shall be permitted unless there is a reasonable showing by evidence in the record or proffered by the claimant which would provide a reasonable basis for recovery of such damages. The claimant may move to amend her or his complaint to assert a claim for punitive damages as allowed by the rules of civil procedure. The rules of civil procedure shall be liberally construed so as to allow the claimant discovery of evidence which appears reasonably calculated to lead to admissible evidence on the issue of punitive damages. No discovery of financial worth shall proceed until after the pleading concerning punitive damages is permitted.

Cohen argues that she satisfied the requirements of § 768.72 because she proffered evidence of malice and wanton and reckless conduct sufficient to establish a reasonable basis for her punitive damages claim. However, the Florida Supreme Court has interpreted § 768.72 as requiring the dismissal of any request for punitive damages asserted without leave of the court. See Simeon, Inc. v. Cox, 671 So. 2d 158, 160 (Fla. 1996) (concluding "[i]t was inconsequential that the trial court

... held a hearing" to determine whether there was an evidentiary basis for a punitive damages claim stated in the initial complaint, because under the statute "any punitive damages claim alleged prior to a party asking for and receiving leave of the court must be dismissed or stricken."). See also WFTV, Inc. v. Hinn, 705 So. 2d 1010, 1011 (Fla. 5th Dist. Ct. App., 1998); Mayer v. Frank, 659 So. 2d 1254, 1255 (Fla. 4th Dist. Ct. App. 1995).

Thus, if § 768.72 applies in this case, the district court correctly struck the request for punitive damages from Cohen's complaint, which means that request could not provide a basis for federal diversity jurisdiction. If, on the other hand, § 768.72 does not apply, then the request for punitive d ages should not have been struck, and would provide a sufficient basis to satisfy the amount-in-controversy requirement for diversity jurisdiction. Accordingly, we must determine whether the pleading requirements of § 768.72 apply here, which entails resolving whether they conflict with any Federal Rule of Civil Procedure.[2]

Federal courts sitting in diversity are required to apply state substantive law and federal procedural law. See Erie R. Co. v. Tompkins, 304 U.S. 64, 78, 58 S. Ct. 817, 822 (1938); Lundgren v. McDaniel, 814 F.2d 600, 605 (11th Cir. 1987). The distinction between substance and procedure is often elusive, however, and the Supreme Court struggled for years to delineate it. In Guaranty Trust Co. of New York v. York, 326

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[2] We recognize that § 768.72 contains a discovery component as well as a pleading component, however, its discovery provision is not at issue in this case.

U.S. 99, 109, 65 S. Ct. 1464, 1470 (1945), the Court adopted an "outcome-determinative" test, meaning that the question of whether to apply state or federal law in diversity cases should be resolved so that "the outcome of the litigation in federal court [would] be substantially the same ... as it would be if tried in a State court." Realizing that even purely procedural laws could be outcome-determinative, the Court retreated from the York test 13 years later in Byrd v. Blue Ridge Rural Electric Coop., 356 U.S. 525, 78 S. Ct. 893 (1958). That decision held that in order to decide which rule should apply, courts must balance the federal interest in uniform process against the state interest in uniformity of results. See 356 U.S. at 536-40, 78 S. Ct. at 900-02.

Seven years later, in Hanna v. Plumer, 380 U.S. 460, 85 S. Ct. 1136 (1965), the Court developed a two-part test for deciding when state law should apply in federal diversity cases. Under the Hanna test, a court must determine whether the state law in question directly conflicts with a Federal Rule of Civil Procedure. If it does, "the court [is] instructed to apply the Federal rule, and can refuse to do so only if the Advisory Committee, [the Supreme] Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the [Rules] Enabling Act nor constitutional restrictions." Hanna, 380 U.S. at 47 1, 85 S. Ct. at 1144.

In addressing the applicability of § 768.72, at least one district court asked if it is substantive or procedural, and in answering that question looked to state law decisions characterizing the provision as substantive for some other purpose (such as the division of authority between the state legislature and judiciary). See Teel v. United Techs. Pratt &

Whitney, 953 F. Supp. 1534,1540 (S.D. Fla. 1997). That approach jumbles up the questions. Under Hanna, the proper question to ask is not whether the state law provision is procedural or substantive; instead, the court must ask whether the state law provision conflicts with a federal procedural rule. If it does, the federal procedural rule applies and the state provision does not. Stated another way, if the state law conflicts with a federal procedural rule, then the state law is procedural for Erie/Hanna purposes regardless of how it may be characterized for other purposes.

The only exception is where the advisory committee, the Supreme Court, and Congress have collectively erred and adopted a federal procedural rule that is either unconstitutional or should not have been adopted under the Rules Enabling Act process because it is a matter of substantive law. That exception will be exceedingly rare, and it does not apply here because, as we shall see, § 768.72 conflicts with Federal Rule of Civil Procedure 8(a)(3), which is a procedural rule and is not unconstitutional. To reiterate the important point that is sometimes overlooked: where state law conflicts with a federal rule of procedure, the substance versus procedure question is asked only about the federal rule, not about the state law provision. That is the first prong of the Hanna test.

The second prong of the Hanna test comes into play only if the state law does not conflict with a Federal Rule; if that is the case, then the court must determine whether failure to apply the state law would lead to different outcomes in state and federal court and result in inequitable administration of the laws or forum shopping. See Hanna, 380 U.S. at 468, 85 S. Ct. at 1142. But those determinations are not reached where the

first prong of Hanna applies, i.e., where the state provision conflicts with a federal rule of procedure.

Applying the Hanna test, federal district courts in Florida have reached different conclusions about whether § 768.72 applies in diversity cases. Most of the courts to address the matter agree that § 768.72 implicates Federal Rules of Civil Procedure 8(a) and 9(g), but they have split almost evenly on whether the statute actually conflicts with either or both of those rules. See, e.g., Alexander v. University/Gainesville Healthcare Ctr., Inc., 17 F. Supp.2d 1291, 1292 (N.D. Fla. 1998) (conflicts with Rule 8(a)); Tutor Time Child Care Sys., Inc. v. Franks Inv. Group, Inc., 966 F. Supp. 1188, 1190 (S.D. Fla. 1997) (conflicts with both Rule 8(a) and Rule 9(g)); Teel, 953 F. Supp. at 1538-41 (no conflict); Sanders v. Mayor's Jewelers, Inc., 942 F. Supp. 571, 575 (S.D. Fla. 1996) (no conflict); Al-Site Corp. v. VSI Int'l, Inc., 842 F. Supp. 507, 512 (S.D. Fla. 1993) (no conflict); State of Wisconsin Inv. Bd. v. Plantation Square Assocs., Ltd., 761 F. Supp. 1569, 1573-80 (S.D. Fla. 1991) (conflicts with Rule 8(a)); Citron v. Armstrong World Indus., Inc., 721 F. Supp. 1259, 1261-62 (S.D. Fla. 1989) (conflicts with Rule 9(g)).

Cohen argues that § 768.72 conflicts with Federal Rule of Civil Procedure 8(a)(2) and (a)(3). Rule 8(a) states, "A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain ... (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks."

Rule 8(a)(2)'s "short and plain statement" rule abandons traditional pleading formalities, requiring only that the pleading "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." Conley v. Gibson, 355 U.S. 41, 47, 78 S. Ct. 99, 103 (1957). Cohen argues that § 768.72 essentially requires heightened pleading for punitive damages claims, contrary to the short and plain statement rule of 8(a)(2). It is clear, however, that a request for punitive damages is not a "claim" within the meaning of 8(a)(2); it is only part of the relief prayed for in a claim. Thus, there is no conflict between § 768.72 and Rule 8(a)(2).

As one district court has pointed out, "the more relevant portion of Rule 8 appears to be subsection (a)(3)." Teel, 953 F. Supp. at 1538. We have explained that under Rule 8(a)(3), any pleading that sets forth a claim must include a "concise statement identifying the remedies and the parties against whom relief is sought. . . . '" Goldsmith v. City of Atmore, 996 F.2d 115 5, 1161 (11th Cir. 1993) (quoting 5 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1255, at 366 (2d ed. 1990)). Punitive damages are a remedy, so under the rule a request for them should be included in the complaint. As we noted above, however, § 768.72 prohibits the inclusion of a request for punitive damages in any pleading without leave of court. Thus, it appears that § 768.72 does conflict with Rule 8(a)(3).

Office Depot contends that there is no real conflict between § 768.72 and Rule 8(a)(3) because Federal Rule of Civil Procedure 54(c) essentially renders Rule 8(a)(3) a nullity. It is true that Rule 54(c) tempers the effect of Rule 8(a)(3) somewhat by stating that, except in the case of default

judgments, "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings." But we do not view that language of Rule 54(c) as eviscerating Rule 8(a)(3)'s express and unambiguous direction that the plaintiff include a demand for relief in her pleadings. "The demand in fact may be helpful in indicating the relief to which plaintiff is entitled.... In addition, relief that the parties do not desire should not be forced on them." 10 Wright, Miller, & Kane, Federal Practice & Procedure § 2662, at 158-60 (3d ed. 1998). Furthermore, the portion of Rule 54(c) relating to default judgments provides that where the party against whom the claim is brought fails to defend against the claim, the relief awarded in a default judgment "shall not be different in kind from or exceed in amount that prayed for in the demand for judgment." Thus, that part of Rule 54 actually reinforces Rule 8(a)(3)'s direction that the relief sought be included it the complaint.

Even if Rule 8(a)(3) does not require a plaintiff to include in a complaint a request for all the relief sought, there is still a conflict between § 768.72 and Rule 8(a)(3), because the rule clearly allows the plaintiff to include a request for punitive damages in her initial complaint, whereas § 768.72 prevents her from doing so. A state law may conflict with a Federal Rule even where it violates no affirmative command or requirement of the rule, see Hanna, 380 U.S. at 470, 85 S. Ct. at 1143, if the Federal Rule "occupies the statute's field of operation." Burlington N. R.R. Co. v. Woods, 480 U.S. 1, 7, 107 S. Ct. 967, 970 (1987). See also United States v. Lockheed Missiles & Space Co., 171 F.3d 1208, 1217 (9th Cir. 1999); S.A. Healy Co. v. Milwaukee Metropolitan Sewerage Dist., 60

F.3d 305, 307 (7th Cir. 1995); Exxon CM. v. Burglin, 4211 F.3d 948, 950 n.3 (5th Cir. 1995); Neifeld v. Steinberg, 438 F.2d 423, 426 (3d Cir. 1971). Rule 8(a)(3) occupies [§ 768.72's] field of operation," because Rule 8(a)(3) governs the ability of plaintiffs to request any and all of the relief sought (including punitive damages) in all pleadings that state a claim (including initial complaints). If applied in federal court, § 768.72 would impair the operation and effect of Rule 8(a)(3).

The nature of the conflict between § 768.72 and Rule 8(a)(3) is similar to the conflict in Hanna itself. The issue in that case was whether a Massachusetts law or Federal Rule of Civil Procedure 4(d)(1) should govern service of process. The Massachusetts law provided that service could be effected only "by delivery in hand upon [the] executor or administrator . . . ." Hanna, 380 U.S. at 462, 85 S. Ct. at 1139 (quoting Mass. Gen. Laws ch. 197, § 9 (195 8)). Rule 4(d)(1), on the other hand, provided that "[s]ervice shall be made ... [u]pon an individual ... by delivering a copy of the summons and of the complaint to him personally or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. . . ." Id. at 461, 85 S. Ct. at 1138-39 (quoting Fed. R. Civ. P. 4(d)(1)) (emphasis added).

Although the express language of Rule 4(d)(1) arguably could have been viewed as not conflicting with the Massachusetts law, the Supreme Court concluded that "the clash [was] unavoidable" because "Rule 4(d)(1) says - implicitly, but with unmistakable clarity - that inhand service is not required in federal courts." Id. at 470, 85 S. Ct. at 1143. Likewise, in this case, because Rule 8(a)(3) allows a plaintiff to request in her initial complaint all the relief she seeks, it says

"implicitly, but with unmistakable clarity" that a plaintiff is not required to wait until a later stage of the litigation to include a prayer for punitive damages, nor is she required to proffer evidence or obtain leave of court before doing so. In short, Rule 8(a)(3) occupies the field in which the pleading portion of § 768.72 would otherwise operate, leaving no room for it. The two provisions do conflict.

Having concluded that Florida Statutes § 768.7 conflicts with Rule 8(a)(3), we must apply Rule 8(a)(3) unless it transgresses the Rules Enabling Act or the Constitution. See id. at 471, 85 S. Ct. at 1144. The Rules Enabling Act, 28 U.S.C. § 2072, provides, in pertinent part:

> (a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.
>
> (b) Such rules shall not abridge, enlarge or modify any substantive right ....

It is clear that a pleading rule such as 8(a)(3) relates to the "practice and procedure" of the district courts. See, e.g., Follenfant v. Rogers, 359 F.2d 30, 31-32 (5th Cir. 1966) (matters of pleading are governed by "rules of practice" and therefore are controlled by the Federal Rules, not state law). Furthermore, in Sibbach v. Wilson & Co., 312 U.S. 1, 14, 61 S. Ct. 422, 427 (1941), the Supreme Court held that as long as a Federal Rule "really regulates procedure," it will not be held

invalid on the ground that it affects substantive rights. As the Court later explained:

> Undoubtedly most alterations of the rules of practice and procedure may and often do affect the rights of litigants. Congress' prohibition of any alteration of substantive rights of litigants was obviously not addressed to such incidental effects as necessarily attend the adoption of the prescribed new rules of procedure upon the rights of litigants who, agreeably to rules of practice and procedure, have been brought before a court authorized to determine their rights.

Mississippi Pub. Corp. v. Murphree, 326 U.S. 438, 445, 66 S. Ct. 242, 246 (1946).

Finally, none of the parties in this case or any other cases have challenged Rule 8(a)(3) as unconstitutional, and we see no basis for such a challenge.

III. CONCLUSION

Our application of Hanna leads us to conclude that the pleading component of § 768.72 does not apply in this case due to its conflict with Rule 8(a)(3). For that reason, we hold that the pleading requirements of Florida Statutes § 768.72 are inapplicable in federal diversity cases. It follows that Cohen's request for punitive damages should not have been dismissed for failure to comply with those requirements. Having determined that the district court erred in striking Cohen's

request for punitive damages, and that those damages may satisfy the amount-in-controversy requirement for diversity jurisdiction, we do not decide whether the other relief requested, including attorney fees and injunctive relief, would be sufficient to meet that requirement.

Accordingly, we REVERSE the district court's dismissal for lack of subject matter jurisdiction and REMAND the case for further proceedings consistent with this opinion.

APPENDIX B - OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED FEBRUARY 24, 2000

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-4787THOMAS K, KAHN
D.C. Docket No. 97-3611 -Civ-JAL

CHERYL COHEN, on behalf of herself and others similarly situated,

Plaintiff - Appellant,

versus

OFFICE DEPOT, INC., a Florida corporation,

Defendant - Appellee.

Appeal from the United States District Court
for the Southern District of Florida
(February 24, 2000)

ON PETITION FOR REHEARING AND
SUGGESTION OF REHEARING EN BANC

Before BIRCH and CARNES, Circuit Judges, and MILLS*, Senior District Judge..

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*Honorable Richard Mills, Senior U.S. District Judge for Central District of Illinois, sitting by designation.

CARNES, Circuit Judge:

In our prior opinion in this case, we held that Florida Statute § 768.72 conflicts with and must yield to the "short and plain statement" rule contained in Federal Rule of Civil Procedure 8(a)(3), and as a result a Florida plaintiff in federal court because of diversity jurisdiction need not obtain leave of court before pleading a request for punitive damages. Cohen v. Office Depot Inc., 184 F.3d 1292, 1295 - 99 (11 th Cir. 1999) ("Cohen I"). We adhere to and leave that part of our earlier opinion intact.[3]

Relying on Tapscott v. MS Dealer Service Corp., 77 F.3d 1353, 1358-59 (11th Cir. 1996), we also held that "in a class action lawsuit punitive damages may be aggregated to satisfy the amount-in-controversy requirement for each class member," at least "where state law provides that an award of punitive damages is for the 'public benefit' or 'collective good,' and the award would reflect 'the wrongfulness of the defendant's course of conduct as a whole.'" Cohen I, 184 F.3d at 1295 (quoting Tapscott, 77 F.3d at 1358). Combining our two holdings, we concluded that the complaint satisfied the amount in controversy requirement because it requested $ 10,000,000 in punitive damages for the entire class of approximately 39,000 Office Depot catalogue customers. See id. at 1299.

In its petition for rehearing, Office Depot has belatedly pointed out the tension between the Tapscott decision, on

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[3] For a full recitation of the relevant facts of this case, see Cohen I, 184 F.3d at 1293-94.

which we relied in our earlier opinion in this case, and the decision in Lindsey v. Alabama Telephone Co., 576 F.2d 593 (5th Cir. 1978). Of course, pre-split or "Old Fifth" decisions such as Lindsey are binding on us, see Bonner v. City of Prichard, 661 F.2d 1206, 1207 (11th Cir. 1981), and where two prior panel decisions conflict we are bound to follow the oldest one. See United States v. Steele, 147 F.3d 316, 1318 (11th Cir. 1998) (en banc) ("It is the firmly established rule of this circuit that each succeeding panel is bound by the holding of the first panel to address issue of law, unless and until that holding is overruled en banc, or by the Supreme Court.") (internal quotation marks and citation omitted); United States v. Dailey, 24 F.3d 1323, 1327 (11th Cir. 1994) (where there is an intracircuit conflict of authority, "the earliest panel opinion resolving the issue in question binds this circuit until the court resolves the issue en banc") (internal quotation marks and citation omitted).

For reasons we will soon discuss, we conclude that Tapscott's holding about aggregation of punitive damages is inconsistent with the earlier holding on the same legal issue in Lindsey, and accordingly we must follow Lindsey. Doing so, we conclude that the total of $ 10,000,000 in punitive damages that was pleaded for the class of 39,000 members in this case is insufficient to satisfy the $75,000 amount in controversy requirement. This conclusion requires us to address plaintiff, class-representative Cohen's remaining arguments involving alternative theories for satisfying the amount in controversy requirement, which are that it is satisfied because of the value of the requested injunctive relief, and because of the amount of attorney fees due if the class prevails. We will discuss those issues in a later part of this opinion, but we begin with a

discussion of the inconsistency of Tapscott (and our own prior opinion following it) with Lindsey.

I. THE CONFLICT BETWEEN LINDSEY AND TAPSCOTT REGARDING AGGREGATION OF PUNITIVE DAMAGES

To avoid adding confusion to conflict, we first explain why referring to the "aggregation" of punitive damages in the context of a class action can be a bit misleading. In this case, as in Lindsey and Tapscott the punitive damages claim is a single claim on behalf of the entire class; it is not the sum total of 39,000 individual punitive damages claims. Because each class member could have sought punitive damages in individual suits, courts sometimes phrase the question as whether a class claim for punitive damages can be "aggregated" to satisfy the jurisdictional amount in controversy requirement for a class. The question, however, is not whether distinct punitive damages claims can be added together, but instead it is whether the single punitive damage claim on behalf of the class can be attributed in toto to each and every class member so they can individually satisfy the requisite amount in controversy, a requirement mandated by Zahn v. International Paper Co., 414 U.S. 291, 94 S. Ct. 50 (1973).[4] If the single punitive damages claim cannot be attributed as a whole to each

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[4] Cohen argues that Zahn's holding requiring dismissal from a class suit of any plaintiff whose individual claim does not satisfy the amount in controversy requirement has been superseded by the 1990 amendments to 28 U.S.C. § 1367. As will be discussed, we need not decide that issue to resolve the present case. See infra note 13.

class member, it must be allocated or divided pro rata among the class members, and after that is done the total amount of relief sought by each plaintiff must satisfy the jurisdictional amount. With that clarification of the question, we turn to the conflicting answers of Lindsey and Tapscott.[5]

Lindsey involved a state law class action suit against two telephone companies alleged to have unlawfully extracted excessive cash deposits from the class. See Lindsey, 576 F.2d at 593. The defendants removed the case to federal court on diversity grounds. See id. at 593-94. The complaint, as construed by the Court, sought: (1) $2,000 compensatory damages for Lindsey, (2) an unspecified sum of compensatory damages for the class, which contained an unspecified number of plaintiffs, and (3) $ 1,000,000 punitive damages on behalf of the class. See id. at 595.

The Lindsey Court began its analysis by citing Snyder v. Harris, 394 U.S. 332, 89 S. Ct. 105 3 (1969), for the broad proposition that multiple plaintiffs suing in a class may not aggregate any claims for the purpose of satisfying the amount in controversy requirement of diversity jurisdiction. Lindsey, 576 F.2d at 594. The Court then noted that each member of a class must individually satisfy the jurisdictional amount to

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[5] Although the term "aggregation" is slightly misleading in the context of punitive damages and attorneys fees, it is commonly used by courts when addressing the issue of whether the total amount of a class claim should be attributed to each member of the class. Therefore, to avoid further confusion and for the sake of consistency, we will continue to refer to the issue as one of "aggregation."

avoid being dismissed from the class suit. See id. (citing Zahn, 414 U.S.,at 300, 94 S. Ct. at 511). Because the Lindsey plaintiff had failed to plead a specific number of class members, the Court explained that it could not determine "what dollar amount represent[ed] the 'amount in controversy' for each member off the class." Id. at 595 (emphasis added). Noting that the grounds for removal jurisdiction must be found in the plaintiff's complaint itself, the Court explained that "it was not open for [the] defendants to attempt to show that the class was small enough that the claims on its behalf exceeded the sum of $10,000 per capita," id., which was the amount in controversy requirement at that time, see id. at 593.

Because it could not, tell from the complaint the number of class members, the Lindsey Court could not determine whether each member's claim satisfied the jurisdictional amount, and it therefore held that the total specified damage claim for the class - $1,002,000 - had not been shown to satisfy the amount in controversy requirement. See id. at 595. A necessary part of Lindsey's reasoning is the holding that for amount in controversy purposes a class punitive damages claim must be allocated pro rata to each class member. Otherwise, the result in that case would have been different. If the Lindsey Court had concluded that a class claim for punitive damages could be attributed in toto to each class member, i.e., considered in the aggregate, for amount in controversy purposes, the $1,000,000 punitive damages claim clearly would have sufficed, regardless of whether the number of class members in Lindsey had been two or two million. The number of class members would have been irrelevant, instead of the critical factor in the decision. Thus, Lindsey inescapably stands for the proposition that a federal court cannot exercise

diversity jurisdiction over a class action - even with completely diverse parties - solely because the total punitive damages claim on behalf of the entire class exceeds the jurisdiction amount in controversy. Instead, under Lindsey, the punitive damages claim for the class must be assigned on a pro rata basis to each class member for amount in controversy purposes. See id.

Three years after Lindsey, we split from the Fifth Circuit but retained its decisional law as our own, see Bonner, 661 F.2d at 1207, and fifteen years after the split, this Court decided Tapscott v. MS Dealer Serv. Corp. In that case, we faced another attempt to base diversity jurisdiction on a class claim for punitive damages, but we mistakenly considered the matter as one of first impression.[6] See Tapscott, 77 F.3d at 1358.. The plaintiffs in Tapscott brought a state law class action, alleging a class of over 10,000 members. See id. at 1355 n.2. The class sought statutory damages, injunctive relief, and an unspecified amount of compensatory and punitive damages, based on the defendant's allegedly fraudulent conduct in the sale of extended service contracts. See id. at 1355. The defendants removed the case to federal court on diversity jurisdiction grounds. See id. The plaintiffs contested the removal with affidavits attesting that the individual recovery

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[6] The Tapscott opinion cites Lindsey for the proposition that each member of a class must individually satisfy the amount in controversy requirement in order to avoid being dismissed from the suit. See Tapscott, 77 F.3d at 1357 n.9. But the opinion does not mention the part of Lindsey that requires a pro rata distribution of the claimed punitive damages for purposes of determining the amount in controversy.

for each plaintiff would not exceed $50,000, the amount in controversy required for diversity jurisdiction at the time. See id. The defendants responded that, for jurisdictional purposes, the class claim for punitive damages should be considered in the aggregate. See id. at 137-59. We agreed and upheld the removal of the case to federal court. See id. at 1359.

In Tapscott, this Court pointed to the Supreme Court's discussion in Snyder, which indicated that multiple plaintiffs may aggregate claims if they have "a single title or right in which they have a common d undivided interest." Id. at 1357 (quoting Snyder 394 U.S. at 335, 89 S. Ct. at 1056). We then considered the nature of punitive damages under Alabama law, finding that Alabama awards punitive damages to plaintiffs not "as a matter of right," but rather as a means to punish and deter wrongful conduct. See id. at 1358. Because punitive damages were intended to serve the collective good, we reasoned that the class had a "common and undivided interest" in the punitive damages claim. See id. at 1358-59. That is why this Court in Tapscott permitted the punitive damages claim to be used to satisfy the requisite amount in controversy for the entire class; in effect, we let the whole amount of the punitive damages claim be used by each class member for that purpose, a result inconsistent with the decision in Lindsey almost twenty years earlier. See id. at 1359.

Attempting to distinguish Tapscott from Lindsey, Cohen points to the analysis in Tapscott addressing whether the punitive damages claim constituted a "single collective right in which [the class members had] a common and undivided interest." Id. She contends that the "common and undivided interest" issue was never presented to us in Lindsey, and thus,

there is no real conflict between our Lindsey and Tapscott decisions. Cohen's contention misconstrues the operation of our prior panel precedent rule. The issue in Tapscott was the same as that in Lindsey: whether a class claim for punitive damages can be considered in the aggregate in order to establish diversity jurisdiction over all potential members of a class, or must instead be attributed pro rata to each class member.

"Common and undivided interest" is simply the standard used to decide which, if any, claims by multiple plaintiffs may be considered in the aggregate for jurisdictional purposes, and which must be divide among the class members. See Snyder, 394 U.S. at 335, 89 S. Ct. at 1056. But we had already decided in Lindsey that a class claim for punitive damages could not be considered in the aggregate for each class member, or at least that such a claim, arising under Alabama law could not be. Our conclusion to the contrary in Tapscott, which also involved Alabama punitive damages law, is inconsistent with the result in Lindsey. Because the same state law governed punitive damages in each case, there can be no difference between the two cases insofar as the "common and undivided interest" analysis is concerned.[7]

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[7] Compare Allen v. R H Oil & Gas Co., 6 3 F.3d 132 (5th Cir. 1995) (allowing aggregated class claim for punitive damages because, under Mississippi law, plaintiffs had a "common and undivided interest" in punitive damages claim), with Ard v. Transcontinental Gas Pipe Line Corp., 138 F.3d 596, 602 (5th Cir. 1998) (disallowing aggregated class claim for punitive damages in Louisiana case and stating that "[i]t is unclear to us what Mississippi law regarding punitive damages

The fact that this case involves a Florida law punitive damages claim does not distinguish it from Lindsey, because as we concluded in our prior panel opinion in this case, the nature of punitive damages is the same under Florida law as under Alabama law. See Cohen I, 184 F.3d at 1295. We explained that both states award punitive damages to serve the collective good, noting particularly that "Florida law, like Alabama law, provides that 'punitive damages are warranted only where the egregious wrongdoing of the defendant ... constitutes a public wrong.'" Id. (citation omitted). Consequently, there can be no difference between this case and Lindsey stemming from a "common and undivided interest" analysis of state punitive damages law.[8]

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drove the Allen panel to depart from Lindsey's rule, but we find no principle in Louisiana law ... that permits us to depart from Lindsey ").

[8] As we noted in our prior opinion in this case, our decision in Tapscott to consider the class punitive damages claim in the aggregate was also based the fact that "the award of punitive damages [would] reflect not the wrong done to any single individual but the wrongfulness of the conduct as a whole." See Cohen I 184 F.3d at 1295 (citing Tapscott, 77 F.3d at 1358-59)). The class in that case consisted of over 10,000 members, and the allegedly fraudulent transaction underlying each member's claim involved relatively small amounts of money. See Tapscott, 77 F.3d at 1358-59. Reasoning that "where the wrong to the individual is small but the course of conduct is large, the potential punitive damages would be to punish and deter the course of conduct as a whole," we concluded in Tapscott that it was appropriate to view the class

claim for punitive damages in the aggregate. Id. at 1359. We also suggested that if the facts indicated the punitive damages award "would be determined on an individualized consideration of the egregiousness of the harm done to individual class members," id. at 1359 n.13, instead of the "wrongfulness of the defendant's course of conduct as a whole," id. at 1358, then aggregation might not be proper. See id. atl359 n.13. In view of this analysis in Tapscott, the Lindsey decision arguably could be viewed as holding only this: when a plaintiff fails to specify the size of the class, thereby preventing the court from determining the extent of the defendant's wrongful course of conduct, the class claim for punitive damages cannot be viewed in the "aggregate," i.e., it cannot be attributed in toto to each class member.

Unfortunately, our analysis in Lindsey forecloses that potential distinction between that case and Tapscott. In Lindsey, we stated that if the plaintiff had alleged a specific number of class members, that allegation "would have permitted the court to ascertain what dollar amount represents the 'amount in controversy' for each member of the class." Lindsey 576 F.2d at 595 (emphasis added). Significantly, our analysis in Tapscott suggests that the aggregation of punitive damages is proper when the defendant's course of conduct affects a large number of individuals. See Tapscott, 77 F.3d at 1359. But according to our prior analysis in Lindsey, a "large" class is exactly what would have prevented the amount in controversy requirement from being satisfied. Our concern in Lindsey was that the number of class members, or the divisor, might be so large that the $1,000,000 punitive damages claim, when divided by the number of class members, would result in

Cohen's real argument is that the result and holding of Lindsey are wrong because we failed to apply a "common and undivided interest" analysis - she says it was not even considered. Even if we thought Lindsey wrong, the prior panel precedent rule is not dependent upon a subsequent panel's

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an amount less than $10,000 (the requisite amount in controversy at the time). We indicated in Lindsey that the class would satisfy the amount in controversy requirement if the complaint alleged a total number of members that "was small enough that the claims on its behalf exceeded the sum of $10,000 per capita" Lindsey 576 F.2d at 595 (emphasis added). Thus, while our opinion in Lindsey does not explicitly forbid the aggregation of a class claim for punitive damages, the reasoning and result in that opinion does.

Under our reasoning in Lindsey, a punitive damages claim must be divided by the total number of class members with the quotient attributable to each class member for amount in controversy purposes. See id. Our inability to determine the number of class members, or the divisor, was critical not because we could not determine the nature of the defendants' course of conduct, but because without a divisor we could not do the division necessary. We could not divide the class punitive damages claim by the number of class members without knowing that number. A Fifth Circuit panel recently acknowledged the necessary implication of our Lindsey decision. See Ard, 138 F.3d at 601 (construing Lindsey to "appl[y] Snyder's reasoning that compensatory damage claims cannot be aggregated for jurisdictional purposes to the context of punitive damage claims"); see supra at note 6.

appraisal of the initial decision's correctness. Nor is the operation of the rule dependent upon the skill of the attorneys or wisdom of the judges involved with the prior decision - upon what was argued or considered. Unless and until the holding of a prior decision is overruled by the Supreme Court or by the en bane court, that holding is the law of this Circuit regardless of what might have happened had other arguments been made to the panel that decided the issue first.

Lindsey held that, for purposes of deciding whether the amount in controversy requirement had been satisfied, the amount of an Alabama punitive damages claim was to be divided by the number of class members and the result attributed to each member of the class. Tapscott decided to the contrary. Because Lindsey predates Tapscott, we must follow Lindsey as the precedent of this Court. See Steele, 147 F.3d at 1318; Dailey, 24 F.3d at 1327.

Accordingly, we rescind that part of our prior opinion in this case that relied upon Tapscott to hold that the $10,000,000 punitive damages claim on behalf of Cohen's proposed class satisfied the amount in controversy requirement for diversity jurisdiction over this case. See Cohen I, 184 F.3d at 1294-95. The punitive damages claim does not satisfy the amount in controversy requirement, because when the $ 10,000,000 class claim for punitive damages is divided among the alleged 39,000 class members, as Lindsey requires for amount in controversy purposes, each member's share of the claim is approximately $256.

We now address Cohen's other two grounds for satisfying the requisite amount-in-controversy: (1) the value of

the requested injunctive relief, and (2) the amount of attorney fees due if the class prevails.

II. COHEN'S OTHER GROUNDS FOR DIVERSITY JURISDICTION

A. INJUNCTIVE RELIEF

In addition to requesting compensatory and punitive damages, this lawsuit seeks to enjoin Office Depot from engaging in unfair and misleading advertising regarding the catalogue prices of its products. Cohen claims that Office Depot's advertising indicates that the prices for products purchased from its catalogues are the lowest prices available anywhere, but that the truth is some products are less expensive if purchased at Office Depot stores. She argues that enjoining such allegedly misleading advertising would "result[] in changes to Office Depot's advertising and business practices, thereby benefitting the Plaintiff class, as a whole, by an amount that is clearly in excess of the jurisdictional requirement of Section 1332." Appellant's Br. 44-45.

When a plaintiff seeks injunctive or declaratory relief, the amount in controversy is the monetary value of the object of the litigation from the plaintiff's perspective. See Ericsson GE Mobile Communications, Inc. v. Motorola Communications & Elecs., Inc., 120 F.3d 216, 218-20 (11th Cir. 1997). In other words, the value of the requested injunctive relief is the monetary value of the benefit that would flow to the plaintiff if the injunction were granted. In this case, Cohen maintains that the class has a "common and undivided interest" in the injunctive relief, and thus, if considered in the

aggregate, the monetary value of it to the class - alone or combined with the other claims for relief - would satisfy the $75,000 amount in controversy requirement. However, we need not address whether the monetary value of the requested injunctive relief should be considered in the aggregate, or instead attributed pro rata among the class members, because we conclude that the monetary value of the injunctive relief to the class plaintiffs in this case is "too speculative and immeasurable" to establish the requisite amount in controversy in either event. See id. at 221-222.

We have little trouble concluding "to a legal certainty" that the value of the injunctive relief does not satisfy the jurisdictional amount in this case, see St. Paul Mercury Indem. Co. v. Red Cab Co.,303U.S.283, 288-89, 58 S. Ct. 586, 590 (1938), because we doubt that any monetary value at all would accrue to the class plaintiffs upon issuance of the prospective injunction. If the requested injunctive relief were granted, Office Depot would not be required to offer its products at the lowest price available, but instead could simply raise the price of the products in its stores a sufficient amount that its advertising of catalogue prices was no longer false. That result would comply with the injunction the class seeks, but it would be of no monetary benefit to them. Indeed, to the extent class members also buy products in Office Depot stores, the injunction would cost them money under that scenario.

But let us assume Office Depot's reaction to the requested injunction would be to leave product prices as they are and clarify its advertising to remove any statement that catalogue prices are the same as store prices. That result is the most the class could hope for from the requested injunction, but

it is one which would be of little or no monetary value to class members. The benefit of the injunction to the class plaintiffs would be the knowledge that some office products were less expensive when purchased at Office Depot stores than when purchased through the catalogue. However, upon class certification aid notice, the class plaintiffs would already have known that, because the allegedly misleading advertising is the very basis of the class action.

Although Cohen's complaint seeks class certification under subdivisions (b)(1)(A), (b)(1)(B), and (b)(3) of Fed. R. Civ. P. 23, Cohen's class, if certified, would likely be certified as a (b)(3) class.[9] Certification under Rule 23(b)(3) would

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[9] Because Cohen's class seeks compensatory damages, it cannot be certified as a (b)(1)(A) class. See In re Dennis Greenman Sec. Litig., 829 F.2d 1539, 1545 (11th Cir. 1987). As for potential certification under (b)(1)(B), we fail to see from the complaint's allegations how individual suits against Office Depot brought by one or more class members "would as a practical matter be dispositive of the interests of the other members ... or substantially impair or impede their ability to protect their interests." Fed. R. Civ. P. 23(b)(1)(B); see also 7A Charles Alan Wright & Arthur R.
Miller, Federal Practice and Procedure § 1774 (2nd ed. 1986 (explaining that "(b)(l)(B) allows class actions to be brought in cases in which separate suits might have undesirable effects on the class members"). Moreover, the possibility that an individual suit "will have either precedential or stare decisis effect on later [suits] is not sufficient" for (b)(1)(B) class certification. In re Dennis Greenman Sec. Litig., 829 F.2d at 1546.

require that the class members receive notice of the suit "well before the merits of [it] are adjudicated." See Schwarzschild v. Tse, 69 F.3d 293, 295 (9th Cir. 1995) (citations omitted); Fed. R. Civ. P. 23(c)(2); see also 7B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1788 (2nd ed. 1986). As a result, before any injunction were granted, the class would already know that the catalogue price of some Office Depot products is higher than the store price. Or, stated differently, if the injunction were not granted, the class plaintiffs would still know that the advertising is sometimes false and that they can avoid paying the higher catalogue prices simply by shopping elsewhere or by purchasing the products at Office Depot's stores. The injunctive relief itself would not be of any monetary value to the class members. Cf. Crawford v. American Bankers Ins. Co. of Fla., 987 F. Supp. 1408, 1415 (M.D. Ala. 1997) (explaining that the class members' "financial recovery will come ... from their tort and [restitution] claims, not from the prospective injunctive relief").

The remote possibility - if there be any - that monetary value might somehow flow to the class plaintiffs from the requested injunctive relief is "too speculative and immeasurable to satisfy the amount in controversy requirement." Ericsson, 120 F.3d at 221-222. In Ericsson, the plaintiff company, Ericsson, claimed that the City of Birmingham improperly handled the bidding process for its purchase of a communications system, resulting in the company losing the communications system contract to Motorola. See id. at 217. Ericsson sought to enjoin the city's contract with Motorola and also h4ave the court declare Ericsson the lowest responsible bidder, entitling it to the contract with the city worth almost $ 10,000,000. See id. However, the district court noted that,

under Alabama law, the only remedy available to Ericsson was to have the district court enjoin the performance of the city's contract with Motorola as void. See id. at 221. Not only did the court lack authority to declare Ericsson the lowest bidder, it could not even require the city to rebid the contract. See id.

Consequently, the only benefit to Ericsson from its injunctive relief would have been the possibility that the city might rebid the contract and that, during the rebid, the city might select Ericsson's communications system and price. See id. at 221-22. We refused to pile possibility onto possibility to estimate the value of that benefit, but instead held that "[b]ecause [Ericsson could not] reduce the speculative benefit resulting from a rebid 'to a monetary standard, [] there [was] no pecuniary amount in controversy.'" Id. at 222 (quoting Texas Acorn v. Texas Area 5 Health Sys. Agency, Inc., 559 F.2d 1019, 1023 (5th Cir. 1977)).

Similarly, the injunctive relief in this case involves too many contingencies, such as the manner in which Office Depot might alter its pricing schemes and the extent to which the class members' purchasing patterns might change. Because of these contingencies, any benefit to the class from the injunction cannot be reduced to a reasonable monetary estimate.[10] See id.

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[10] Like the plaintiff in Ericsson, Cohen has not established a monetary value for the injunctive relief claim. See id. at 222 n. 18. Cohen argues that her proposed amended complaints provide bases for valuing the injunctive relief claim, primarily the substantial expense Office Depot would incur by "retooling" its pricing scheme and advertising. The potential cost of compliance to the defendant, however, is irrelevant in

at 222. We therefore conclude that any monetary value to Cohen's class from the injunction is either non-existent, or at least too tenuous of a foundation for diversity jurisdiction. In reaching this conclusion, we also note that the policy underlying 28 U.S.C. § 1332(a), which is to reserve federal court diversity jurisdiction for disputes involving relatively substantial damages, further informs our refusal to speculate about the value of a prospective injunction to the class plaintiffs in this case. See Packard v. Provident Nat'l Bank, 994 F.2d 1039, 1044-45 (3rd. Cir. 1993) (noting that § 1332(a) "must be narrowly construed so as not to frustrate the congressional purpose behind it"). The total compensatory and punitive damages claim for each class member in this case is

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determining the value of the benefit that would be obtained by the plaintiff from an injunction. See Ericsson, 120 F.3d at 218-20. For that reason, the proposed amended complaint did not establish the requisite amount in controversy based on the value of the injunctive relief, and accordingly, the district court did not abuse its discretion in denying leave to amend. See Halliburton & Assocs., Inc. v. Henderson, Few & Co., 774 F.2d 441, 444 (11th Cir. 1985) (noting that when "a complaint as amended is still subject to dismissal, leave to amend need not be given") (citation omitted).

about $260,[11] well below the $75,000 threshold for diversity jurisdiction.

Because the class claim for injunctive relief is too speculative to satisfy the amount in controversy requirement, we turn now to the question of whether the potential recovery of attorney fees, alone or in combination with the damages claims, can establish the jurisdictional amount in controversy.

B. ATTORNEY FEES

On behalf of the class, Cohen brought claims under Florida statutes that prohibit deceptive business practices, see Fla. Stat. § 501.201 et. seq., and misleading advertising, see Fla. Stat. § 817.41. Both statutory causes of action authorize a court to award attorney fees to the prevailing party. See Fla. Stat. § 501.2105; Fla. Stat. § 817.41. Cohen contends that when a statutory cause of action entitles a party to recover reasonable attorney fees, the amount in controversy includes consideration of the amount of those fees. She is correct. See Missouri State Life Ins. Co. v. Jones, 290 U.S. 199, 202, 54 S. Ct. 133, 134

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[11] While there are persuasive reasons for viewing the amount in controversy as the total liability faced by a defendant, instead of as the amount each plaintiff stands to gain, "the Supreme Court has long since closed that door." Davis v. Carl Cannon Chevrolet-Olds. Inc., 182 F.3d 792, 798 (11 th Cir. 1999). In this case, the approximate compensatory damages claim of each member, assuming Cohen's claim is representative of the other class members, is $3.57. Each member's share of the punitive damages claim is approximately $256. The total damages claim of each class member, therefore, is less than $260.

(1933); Premier Indus. Corp. v. Texas Indus. Fastener Co., 450 F.2d 444, 447 (5th Cir. 1971).

Cohen also contends that the attorney fees in this case will clearly surpass the $75,000 threshold for the amount in controversy; and she argues that the amount of fees she anticipates will be awarded either should be (1) attributed to her as the prevailing party, with jurisdiction over the other class plaintiffs established under 28 U.S.C. § 1367(a) (the supplemental jurisdiction provision), or (2) considered in the aggregate and attributed in toto to each member based on their "common and undivided interest" in the attorney fees. Assuming away our doubts that Cohen has established a sufficient basis for her contention that an award of attorney fees

in this case will reach $75,000 or more,[12] we address in turn her arguments as to how that amount of fees should be attributed.

First, we find no basis for attributing the potential award of attorney fees to Cohen, either individually or as the class representative. The claim for attorney fees in this case is based on two Florida statutes: Fla. Stat. § 501.2105(1), authorizing an award of attorney fees to "the prevailing party" in an action based on deceptive business practices; and Fla.

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[12] We doubt that Cohen has sufficiently established that $75,000 in attorneys fees will be recovered in this case. In her proposed amended complaint, Cohen contends that over $60,000 in reasonable attorneys fees had been incurred up to that point in the litigation and that ultimately over $100,000 in fees would be incurred. However, Cohen provided no documentation supporting those contentions or specific explanation for the substantial amount claimed. Arguably, when the amount in controversy substantially depends on a claim for attorneys fees, that claim should receive heightened scrutiny. Cf. Packard 994 F.2d at 1046 (explaining that when a "[punitive damages] claim comprises the bulk of the amount in controversy and may have been colorably asserted solely or primarily [for jurisdictional purposes], that claim should be given particularly close scrutiny"). However, because of the permissive nature of St. Paul's "legal certainty" standard for the sufficiency of a plaintiff's amount in controversy allegation, and because our decision would not be different even if the claimed amount of fees were accurate, we will assume that Cohen has alleged a sufficient basis for a potential attorneys fee award exceeding $100,000, as estimated in her proposed amended complaint.

Stat. § 811.41(6), mandating an award of attorney fees to "[a]ny person prevailing" in an action based on misleading advertising. If this class action were successful on the merits, the entire class of plaintiffs - not just Cohen - would "prevail" in the action, and accordingly, it is the class and not just Cohen who would recover attorney fees under the statutes.[13]

In addition, as an individual class member, Cohen stands to recover no more than $260 in damages. In her first proposed amended complaint, Cohen indicated that over $100,000 in reasonable attorney fees would be incurred in the litigation. Attributing to one plaintiff an anticipated attorney fees award that is over 384 times greater than that plaintiff's stake in the litigation could raise serious questions about the reasonableness of the fee award. For these reasons, we conclude the claim for attorney fees in this case is not attributable solely to Cohen, but instead to the entire class. Because of that conclusion, we must now decide how the

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[13] Cohen's citation to In re Abbot Labs., 51 F.3d 524 (5th Cir. 1995), is inapposite. The Court in that case attributed a claim for attorney fees to the class representatives, because the relevant Louisiana statute provided that a "court may allow the representative parties their reasonable expenses of litigation, including attorney[] fees, when as a result of the class action a fund is made available, or a recovery or compromise is had which is beneficial, to the class." Id. at 526 (emphasis added). Unlike the statute in Abbott, the Florida statutes at issue here do not contain language indicating that the award of attorneys fees should go to the class representatives.

claimed attorney fees should be attributed to each class member for amount in controversy purposes.[14]

Cohen maintains that the class members share a "common and undivided interest" in the anticipated award of attorney fees, and thus, the claim for those fees should be viewed in the aggregate, with the total amount attributed to each class member. Office Depot responds that, like the class claim for punitive damages, the amount of the claimed attorney fees should be divided pro rata among each individual class member. In light of a recent decision by this Circuit and the relevant Florida case law, we conclude that the claim for attorney fees is not "a single title or right in which [the class

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[14] Cohen asks us to join the Fifth and Seventh Circuits in concluding that Congress statutorily overruled Zahn's holding that each plaintiff must assert a claim satisfying the requisite amount in controversy to avoid being dismissed from a class action based on diversity jurisdiction. See Stromberg Metal Works v. Press Mechanical. Inc., 77 F.3d 928, 930-33 (7th Cir. 1996); In re Abbott Lab., 51 F.3d at 527-29. She contends that the 1990 amendments to 28 U.S.C. § 1367 authorize a court to exercise supplemental jurisdiction over the claims of the entire class, once the claim of one class member is found to satisfy the amount the controversy requirement. However, we need not address that argument. Because the claimed attorney fees in this case are not attributable solely to Cohen, no member of the class has an individual claim at satisfies the requisite amount in controversy. Therefore, diversity jurisdiction will exist in this case only if the claimed attorney fees may be considered in the aggregate, attributed as a whole to each class member.

members] have a common and undivided interest" in the claimed attorney fees. See Snyder, 394 U.S. at 335, 89 S. Ct. at 1056. Therefore, for amount in controversy purposes, the estimated total attorney fees award should be divided among all of the class members.

In Darden v. Ford Consumer Finance Co., ___F.3d ____ (11th Cir. 2000), the defendant attempted to remove a class action to federal court on diversity grounds, arguing that the class plaintiffs' claim for attorney fees under the Georgia RICO statute should be considered in the aggregate for amount in controversy purposes. We rejected that argument. Following the principles laid down by the Supreme Court in Snyder, we concluded that the claimed attorney fees did not constitute a "single title or right" in which the class members had a "common and undivided interest." See id. at *3-6. In reaching th t conclusion, we noted that each class plaintiff could have recovered his attorney fees in individual suits under the RICO statute. See id. at *5. It followed that the class members did not share a "single title or right" in the claimed attorney fees, but instead, each member had a "separate and distinct statutory right or claim to recover those attorney[] fees." Id. Noting further that under Georgia law the statutory award of attorney fees serves to compensate injured plaintiffs, we reasoned that considering the fees in the aggregate would contravene Snyder's prohibition against aggregating

compensatory damages.[15] See id. Therefore, we refused to aggregate the claimed attorney fees of the class."[16]

We construe Darden to hold that a statutory claim for attorney fees may not be considered in the aggregate for amount in controversy purposes, at least not when both of these factors are present: (1) the class members have a "separate and distinct" right to recover attorney fees under the relevant statute; and (2) state law provides that the statutory attorney

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[15] Darden distinguished the "collective good" purposes of the punitive damages in Tapscott from the compensatory nature of the attorneys fees in that case. See Darden. Therefore, the decision in Darden did not depend on the continued validity of the Tapscott decision. However, if Darden had somehow reiterated the part of Tapscott that conflicts with Lindsey, we would still be compelled to follow Lindsey to the extent of any conflict. The prior panel precedent rule precludes us from "hold[ing] that two subsequent panel opinions can implicitly overrule a prior panel opinion." Johnson v. City of Fort Lauderdale, Fla., 126 F.3d 1372,1380 n.10 (11thCir. 1997).

[16] This Court also rejected the aggregation of an attorney fees award in Davis, 182 F.3d at 796-97. However, the precedential effect of Davis on this case is minimal, because that case did not involve a statutory right to attorneys fees. Instead, Davis addressed only the "narrow question... [of] whether a fee to be deducted from a [class action] common fund may, if it exceeds $75,000, satisfy the amount-in-controversy requirement." Id. at 796.

fees serve to compensate the class members for their injuries.[17] Applying that holding to the facts of this case, we conclude that the claimed attorney fees may not be considered in the aggregate to establish the requisite amount in controversy.

As for the first factor, the class members in this case could recover their individual attorney fees incurred in separate, individual suits under Florida's consumer protection statutes. See Fla. Stat. § 501.2105(l) (authorizing fee award for "prevailing party"); Fla. Stat. § 817.41(6) (mandating fee award for "[a]ny person prevailing" under the statute). Like the Georgia RICO statute involved in Darden, the Florida statutes in this case provide "each individual plaintiff in a putative class the right to recover attorney[] fees in the case." Darden, The members of Cohen's class are not joining to "enforce a single title or right" in the statutory award of attorney fees, see Snyder, 394 US at 335, 89 S. Ct. at 1056, because each member has a "separate and distinct right" in the claimed fees. See Darden.

The second factor is also present. Like the attorney fees award under the Georgia RICO statute in Darden, an attorney fees award under Florida consumer protection statutes serves an important compensatory purpose. In BMW of North Amer., Inc. v. Krathen, 510 So. 2d 366, 368 (Fla. 4th Dist. Ct. App. 1987), the District Court of Appeals for the Fourth District noted that "the obvious purpose of the 'Little FTC Act' [which includes § 501.2105(1)] is to make consumers whole for losses

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[17] Because both factors are present in this case, we need not decide whether either one standing alone would prevent aggregation of attorney fees to satisfy the amount in controversy.

caused by fraudulent consumer practices [and that] ... [t]hese aims are not served if the attorney[] fees are not included in the protection." Id. at 368 (citation omitted); cf. Florida Erection Serc. v McDonald, 395 So. 2d 203, 207-08 (Fla. 1st Dist. Ct. App. 1981) (explaining that an award of attorney fees, unlike an award of punitive damages, "does not provide remuneration to the claimant over and above the amount necessary to compensate him for his loss"). Even though the primary purpose of such an award is to encourage private enforcement of statutory policies, thus benefitting the public, see Standard Guaranty Ins. Co. v. Quanstrom, 555 So. 2d 828, 833-34 (Fla. 1990), that does not mean attorney fees are not also compensatory in nature. The Florida Supreme Court has recognized that private individuals cannot be expected to pursue statutory causes of action unless their own losses and costs, including their attorney fees, will be fully compensated. See id. (noting that "[i]f ... consumers cannot recover in full their attorney fees, they will quickly determine it is too costly ... to file suit, and individual enforcement of this act will fail") (quoting LaFemey v. Scott Smith Oldsmobile. Inc., 410 So. 2d 534, 536 (Fla. 1st Dist. Ct. App. 1978)). Because the statutory attorney fees involved in this case serve a significant compensatory purpose, in this case as in Darden, aggregating the claimed attorneys fees would be inconsistent with Snyder. Consequently, the nature and purpose of the statutory right to attorney fees in this case strongly resemble those of the statutory right to attorneys fees in Darden, it follows that the result should be the same.

Because the attorney fees authorized by the Florida statutes in this case serve to compensate plaintiffs for losses resulting from allegedly unlawful business practices, and

because claims for those fees could be asserted by the class plaintiffs in individual suits, we conclude that the claimed fees do not constitute "a single title or right in which [the class members] have a common and undivided interest." Snyder, 394 U.S. at 335, 89 S. Ct. at 1056. It follows that the amount of claimed attorney fees may not be considered in the aggregate - may not be attributed in whole to each class member - but instead, like the class claim for punitive damages, it must be divided out among the total number of class members for amount in controversy purposes. Because each class member's damages claim approximates $260, and the claimed attorney fees must be divided pro rata among 39,000 class members, an astronomical amount of attorney fees would have to be recovered in order to satisfy the amount in controversy requirement.[18] Such a recovery is not possible, and therefore, neither is diversity jurisdiction.

III. CONCLUSION

Because we conclude that Cohen has failed to allege a sufficient amount in controversy to establish jurisdiction under 28 U.S.C. § 1332(a), we vacate our prior opinion reversing the district court's dismissal of this case and remanding for further

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[18] Each class member must, in effect, "recover" $74,740 in attorneys fees ($75,000 required for diversity jurisdiction minus the $260 in damages per class member). That means the class would have to recover a total of $2.9 billion in attorneys fees ($74,740 multiplied by the alleged 39,000 class members).

proceedings. We now affirm the district court's order dismissing the case, for lack of subject matter jurisdiction.

AFFIRMED.

APPENDIX C - ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING COHEN'S PETITION FOR REHEARING AND REHEARING EN BANC ISSUED MAY 31, 2000

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 98-4787-HH

CORRECTED

CHERYL COHEN, on behalf of herself and others similarly situated,

Plaintiff-Appellant,

versus

OFFICE DEPOT, INC., a Florida corporation,

Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of Florida

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ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Opinion _____, 11th Cir., 19__, F.2d _____).

Before: BIRCH and CARNES, Circuit Judges, and MILLS*, Senior District Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/Ed Carnes
UNITED STATES CIRCUIT JUDGE

ORD-42
(6/95)

*Honorable Richard Mills, Senior U.S. District Judge for the Central District of Illinois, sitting by designation.

APPENDIX D - ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT GRANTING COHEN'S MOTION TO STAY ISSUANCE OF MANDATE FILED JULY 7, 2000

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 98-4787-HH

CHERYL COHEN, on behalf of herself and others similarly situated,

Plaintiff-Appellant,

versus

OFFICE DEPOT, INC., a Florida corporation,

Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of Florida

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ORDER:

( ) The motion of Appellant, Cohen, for (X) stay () recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

(X) The motion of Appellant, Cohen, for (X) stay () recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including

August 15, 2000, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

/s/ Ed Carnes
UNITED STATES CIRCUIT JUDGE

APPENDIX E - ORDER OF DISMISSAL OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA FILED APRIL 3, 1998

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 97-3611-CIV-LENARD

CHERYL COHEN, on behalf of herself and others similarly situated,

Plaintiff,

vs.

OFFICE DEPOT, INC., a Florida corporation,

Defendant.

_____/

Filed D.C.
APR 03 1998
Carlos Juenke
Clerk U.S. Dist. Ct.
S.D. OF FLA. - MIAMI

ORDER OF DISMISSAL

THIS CAUSE came before the Court upon the Defendant's Motion to Strike Plaintiff's Claims for Punitive Damages (DE16), filed February 2, 1998, Defendant's Motion to Strike Plaintiff's Unauthorized Claims for Attorney's Fees (DE17), filed February 2, 1998, Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction (DE18), filed February

3, 1998, Defendant's Motion to Dismiss (DE20), filed February 3, 1998, and Defendant's Motion for Bond (DE36), filed March 11, 1998. The Court has considered the motions and the responses and replies thereto, and otherwise advised in the premises, finds as follows.

I. INTRODUCTION

On November 12, 1997, Plaintiff, Cheryl Cohen ("Cohen") filed the above-captioned action against Defendant Office Depot ("Office Depot") on behalf of herself and a proposed nationwide class of approximately 39,000 plaintiffs in order to recover actual damages incurred by virtue of allegedly deceptive advertising by Office Depot in its catalogs. Cohen also seeks a permanent injunction barring deceptive advertising by Office Depot, $10,000,000.00 in punitive damages, interest, costs and attorneys' fees. Office Depot responded to the Complaint by filing motions to dismiss Cohen's action for lack of subject matter jurisdiction and for failure to state a claim upon which relief may be granted. Office Depot also asks the Court to strike Cohen's requests for punitive damages and attorneys' fees as unauthorized.

II. ANALYSIS

"Federal courts are courts of limited jurisdiction." Burns v. Windsor Ins. Co., 31 F.3d1092, 1095 (11th Cir. 1994). Where as here, the complaint contains no claims based upon federal law, the plaintiff must allege facts supporting jurisdiction based upon diversity of citizenship pursuant to 28 U.S.C.A. § 1332 (West 1993 & Supp. 1998). The district court has subject matter jurisdiction pursuant to Section 1332

where the matter in controversy exceeds the sum or value of $75,000.00, exclusive of interest and costs, and is between citizens of different states. Where class action allegations are pled, diversity of citizenship is present where the defendant and class representative(s) are of diverse citizenship, irrespective of the citizenship of the potential class members. See Snyder v. Harris, 394 U.S. 332, 340 (1969). In the Complaint, Cohen alleged that she and Office Depot are citizens of Georgia and Florida, respectively, and that "although Plaintiff's compensatory damages may be relatively low, Plaintiff seeks on behalf of herself and the Plaintiff class, aggregate punitive damages of at least $10,000,000.00 and attorney's fees in which Plaintiff will have an undivided interest." (Compl. ¶ 4.) In fact, Plaintiff's alleged compensatory damages amount to approximately $2.30. Id. ¶ 5. As a result, Cohen does not and cannot rely on her allegations with respect to compensatory damages to satisfy the amount in controversy requirement of Section 1332. Further, members of a class cannot aggregate their individual claims to exceed the jurisdictional minimum amount in controversy. See Zahn v International Paper Co., 414 U.S. 291, 294-302 (1973); Snyder v. Harris, 394 U.S. at 335-42.

Cohen does rely on her claims for punitive damages injunctive and declaratory relief and attorneys' fees to satisfy the amount in controversy requirement necessary to this Court's jurisdiction over her action, however. Office Depot contends that Cohen's request for punitive damages contravened Fla. Stat. Ann. § 768.72 (West Supp. 1998) and therefore must be stricken from the Complaint and also as a basis upon which Cohen may rely to for federal jurisdiction. (Def.' s Mot.

Dismiss at 4; Def.'s Mot. Strike Punitive Damages at 3-6.) Section 768.72 provides that

> [i]n any civil action, no claim for punitive damages shall be permitted unless there is a reasonable showing by evidence in the record or proffered by the claimant which would provide a reasonable basis for recovery of such damages. The claimant may move to amend her or his complaint to assert a claim for punitive damages as allowed by the rules of civil procedure. The rules of civil procedure shall be liberally construed so as to allow the claimant discovery of evidence which appears reasonably calculated to lead to admissible evidence on the issue of punitive damages. No discovery of financial worth shall proceed until after the pleading concerning punitive damages is permitted.

In Sanders v. Mayor's Jewelers, Inc., 942 F. Supp. 571 (S.D. Fla. 1996), this Court found Section 768.72 to be fully applicable in federal court. 942 F. Supp. at 575-76. In that case, the Court struck the plaintiff's claims for punitive damages for her failure to request leave to plead such claims. 942 F. Supp. at 576. The Court then instructed the plaintiff to comply with Section 768.72 by applying for leave to assert such claims should she wish to do so. Id. Like the plaintiff in Sanders, Cohen failed to seek leave before including her claim

for punitive damages in the Complaint. As a result, Cohen's punitive damages claims must be stricken.[19]

Cohen, however, asks the Court to distinguish her action from the one brought in Sanders on the ground that Sanders was before the Court under the federal question jurisdiction provision of 28 U.S.C.A. § 1331 (West 1993),

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[19] But for the requirements imposed by Section 768.72, Cohen's $10,000,000.00 punitive damages claim appears to satisfy the amount in controversy requirement. In Tapscott v. MS Dealer Serv. Corp., 77 F.3d 1353 (11th Cir. 1996), the Eleventh Circuit held that punitive damages may be aggregated in a class action where state law provides for such damages and where state law provides for the award of punitive damages for the "public benefit" or "collective good." 77 F.3d at 1358-59. In Florida, "[p]unitive damages are imposed in order to punish the defendant for extreme wrongdoing and to deter others from engaging in similar conduct." Chrysler Corp. v. Wolmer, 499 So. 2d 823, 825 (Fla. 1986) (citing Mercury Motors Express, Inc. v. Smith, 393 So. 2d 545 (Fla. 1981)). "[P]unitive damages are warranted only where the egregious wrongdoing of the defendant, although perhaps not covered by criminal law, nevertheless constitutes a public wrong." Id. (citing Arab Termite & Pest Control, Inc. v. Jenkins, 409 So. 2d 1039 (Fla. 1982)). Punitive damages are available for violations of Fla. Stat. Ann. § 817.41 (prohibiting misleading advertising) and for common law fraud, the theories upon which Counts III and IV of the Complaint are based. As a result, the aggregation of punitive damages to meet the amount in controversy requirement in this case would be proper under the reasoning of Tapscott.

rather than the diversity of citizenship jurisdiction provision of Section 1332. (Pl.'s Resp. at 11-12.) Cohen contends that should the Court fail to distinguish between the cases, the result will be to bar her entirely from pursuing her claims in federal court. Id. Cohen supports her desire to litigate her case in federal court with nothing more than the assertion that "[c]learly, a state court is not equipped to maintain a national class action such as this case, which involves over 39,000 class members [from] at least 39 states." Id. at 12. This assertion is disingenuous at best.

Cohen also has argued that her claims satisfy the amount in controversy requirement based either upon the value of the injunctive and declaratory relief or upon the attorneys' fees that she seeks. The party seeking to invoke the jurisdiction of the federal courts has the burden of proving its existence. See Majd-pour v. Georgiana Community, Hosp. , Inc., 724 F. 2d 901, 903 (11th Cir. 1984); Fountain, Metropolitan Atlanta Rapid Transit Auth., 678 F.2d 1038, 1041 (11th Cir. 1982). The Court must consider the allegations of the Complaint and the evidence submitted by Cohen to determine whether it appears to a legal certainty that her claim is for less than the $75,000.00 jurisdictional minimum and thus that the action must be dismissed. See Baltin v. Alaton Trading Corp., 128 F.3d 1466, 1472 (11th Cir. 1997). "The determination of whether the requisite amount in controversy exists is a federal question; however, 'State law is relevant to this determination insofar as it defines the nature and extent of the right plaintiff seeks to enforce.'" Duderwicz v. Sweetwater Sav. Ass'n, 595 F.2d 1008, 1012 (5th Cir. 1979) (quoting Johns-Manville Sales

Corp. v. Mitchell Enters., Inc., 417 F.2d 129, 131 (5th Cir. 1969)).[20]

In Ericsson GE Mobile Communications, Inc. v. Motorola Communications & Electronics, Inc., 120 F.3d 216 (11th Cir. 1997) , the Eleventh Circuit noted that where a plaintiff seeks "only declaratory and injunctive relief, it is well established that the amount in controversy is measured by the value of the object of the litigation." 120 F.3d at 218 (quoting Hunt v. Washington State Apple Adver. Comm'n, 432 U.S. 333 (1977)). In this case, that object is enforcement of the right of Cohen and the class to be free of those practices of Office Depot that violate the Florida Deceptive and Unfair Trade Practices Act, measured from the Plaintiff's perspective. Fla. Stat. Ann. 501.211(l); 120 F.3d at 21920. Motorola instructs the Court to determine whether the value of the injunctive relief to Cohen and the class is "sufficiently measurable and certain to satisfy" the $75,000.00 requirement. 120 F.3d at 221. In certain types of cases, the value of injunctive relief is "sufficiently measurable."See, e.g., Occidental Chem. Corp. v. Bullard, 995 F.2d 1046, 1047-48 (11th Cir. 1993) (equating value of declaration of rights under and specific performance of option portion of mineral rights lease with fair market value of option property). In other cases, the value of such relief is speculative. See, e.g., Motorola, 120 F.3d at 221-22 (finding value of injunctive relief which would allow plaintiff to rebid for a municipal contract too speculative). In this case, Cohen

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[20] The Eleventh Circuit has adopted as blinding decisions of the former Fifth Circuit rendered prior to October 1, 1981. Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1081) (en banc).

did not support her assertion that "an injunction in this case would require Office Depot to refrain from engaging in unfair and deceptive representations, resulting in changes to Office Depot's advertising and business practices, thereby benefitting the Plaintiff class, as a whole, by an amount that is clearly in excess of the jurisdictional requirement of Section 1332" with a dollar value. See Pl.'s Resp. at 7; Motorola, 120 F.3d at n.18. As in Motorola, the "speculative benefit" resulting from a permanent injunction enjoining Office Depot from deceptive advertising cannot be reduced to a monetary standard, "there is no pecuniary amount in controversy" based upon Cohen and the potential class' request for declaratory and injunctive relief. Motorola, 120 F.3d at 222 (quoting Texas Acorn v. Texas Area 5 Health Sys. Agency, Inc., 559 F.2d 1019, 1023-23 (5th Cir. 1977)). Alternatively, the monetary standard to which the request for injunctive relief may be reduced for Cohen is $2.30, an amount which is not aggregable with the actual alleged losses of the potential class members for the purpose of the amount in controversy determination. See Zahn v. International Paper Co., 414 U.S. 291, 294-302 (1973); Snyder v. Harris, 394 U.S. 332, 335-42 (1969).

Cohen and the proposed class also contend that the amount in controversy requirement is satisfied by their potential entitlement to attorneys' fees on two of the seven claims brought under Sections 501.211 and 817.41, Fla. Stat. Ann. Cohen argues that "[r]ecovery of attorney fees in this action, either in an aggregate award to class members, or individually, by Cohen, as class representative, will satisfy the amount in controversy requirement because the attorney fees that will be incurred in pursuing this complex action will exceed the $75,000 amount required under Section 1332." (Pls.'

Resp. at 4.) Although attorneys' fees where authorized by the statute sued on may be calculated into the amount in controversy determination, see, e.g., Missouri State Life Ins. Co. v. Jones, 290 U.S. 199 (1933), and Graham v. Henegar, 640 F.2d 732 (5th Cir. 1981), it is unclear whether Cohen's argument with respect to the fees warranted by the complexity of this action is sufficient to meet her burden of proving that her claims are within the jurisdiction of this Court. Indeed, attorneys' fees would have to make up the vast majority of the required $75,000 minimum amount in controversy, given that Cohen claims $2.30 in compensatory damages. The Court finds that Cohen has not met her burden on this issue.

III CONCLUSION

In sum, Cohen has neither alleged nor adduced facts which show that the amount in controversy is sufficient to invoke the subject matter jurisdiction of this Court. Further, at this time, it appears to a legal certainty that the claims alleged in the Complaint, other than the claims for punitive damages stricken above, are for less than the jurisdictional minimum set forth by 28 U.S.C.A. § 1132. As a result this case must be dismissed. Based upon the foregoing, it is hereby

ORDERED AND ADJUDGED that this action is **DISMISSED** for lack of subject matter jurisdiction. Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction (DE18) and Defendant's Motion to Strike Plaintiff's Claims for Punitive Damages (DE16) are **GRANTED**. All other pending motions are **DENIED** as moot, and the Clerk shall close this case forthwith.

DONE AND ORDERED in Chambers at Miami, Florida, this 3 day of April, 1998.

S/

JOAN A. LENARD
UNITED STATES DISTRICT JUDGE

CC: Robert C. Maland, Esq.
Alvin D. Lodish, Esq.
Troy Ferguson, Esq.